action that neither party contemplated prior to the filing of the motion for summary judgment. The undue prejudice of this scenario is obvious.

Respondent focuses on the procedural aspects of his added claim, and in doing so overlooks its relevance to the constitutional inquiry that is the thrust of the Petition. "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). Decision of this purely legal question permits the courts to expeditiously weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend a suit on the merits. *Id.* The "desirability of this approach" is apparent where the plaintiff fails "to establish the violation of any constitutional right at all." 500 U.S. at 233.

Respondent never even attempted to establish a violation of his constitutional right to direct his child's education. The trial court attempted to do it for Respondent when it decided the summary judgment motion. To impose personal liability upon Petitioner Lucci relative to this added claim would be an affront to this Court's precedent, which emphasizes the desirability of "weeding out" the qualified immunity issue where the violation of a constitutional right has not properly been claimed.

CONCLUSION

Contrary to Respondent's assertions, this case presents legal questions regarding whether Petitioner Lucci should be protected by qualified immunity, not factual questions about

the merits of the case. The question whether the constitutional right to direct the education of one's child has been clearly established in this school employment context, which requires a balancing of interests test, is exceptionally important: it may have a widespread impact on the educational system in this country, and has not yet been addressed by this Court. The Fifth and Eleventh Circuits are the only jurisdictions with established precedent on point. The Sixth Circuit has now weighed in on the issue, but on a conflicting legal basis, disregarding the accepted "balancing test." The remainder of the Circuits are apparently silent. In light of this exceptional importance, and for all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,

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